No. 86-933

FILED
JAN 20 1987
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1986

CHARLES H. DALE,

Petitioner,

v.

CHICAGO TRIBUNE COMPANY,

Respondent.

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Is This Court's Decision In *Celotex* Limited To Consideration Of Evidence Favorable To Summary Judgment Movants,

and

Did The Trial Court Turn The ADEA Against Older Employees In Interpreting The Act:

> **"It would scarcely be surprising if the employees least adaptable to such a change [a business restructuring] turned out to include a number in the later stages**

> **of their careers . . . it is not surprising that the toll of such a reorganization should be heavier among longer-term (and thus older) employees . . . "**

In this case defendant Company does not deny that, in deciding defendant's summary judgment motion, the trial court relied only on evidence favorable to the Company. Thus, if the decision below were allowed to stand, there would be a rule when considering summary judgment motions for movants requiring consideration of all of the evidence under *Celotex Corp. v. Catrett*, ___ U.S. ___, 106 S. Ct. (1986), and another rule permitting trial courts to overlook evidence favorable to respondents.

In this age discrimination action, under the ADEA which was designed to protect older employees, the trial court's misreading of *Celotex* is particularly prejudicial.[1]

The record is clear that plaintiff Dale carried the burden of proving his prima facie case under *Texas Department of Community Affairs v. Burdine*, 450 U.S. 278 (1981) by refuting item-by-item all memoranda critical of his work. (P1. Tr. Ct. Br. Opp. to Sum. Judgment, Appendix 1). This documentation, submitted to establish plaintiff's satisfactory job performance, the only *Burdine* point at issue, included documents produced by defendant pursuant to discovery but relied upon by plaintiff (Pl. Tr. Ct. Br. Opp. to Sum. Judgment, App. 4). Plaintiff (Op. Br. pp. 2-6) makes specific record references

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[1] Respondent contends (Res. Br. Opp., p. 2) that the trial court's pronouncement, that older employees are likely to suffer more from management reorganizations, is mere *dicta* which does not affect the trial court's disposition of this lawsuit. Such a contention is erroneous because the trial court's pronouncement, which led the court to grant summary judgment against the plaintiff, indicates that the trial court misconstrued the scope and purpose of the ADEA.

(Footnote continued on the following page)

to these documents. Respondent, however, does not point to any instance in which the trial court considered plaintiff's evidence in opposition to its summary judgment motion. Instead, respondent now seeks to divert the Court from the record as though labelling plaintiff's refutation as a "hodgepodge of evidence" (Def. Br. Opp., p. 7) would avoid the issue.

Contrary to defendant's erroneous assertion, plaintiff also relied on this evidence to prove the pretextual nature of defendant's claims, as required under *Burdine*. This evidence was supplemented by statistical evidence, produced in discovery by the defendant in response to plaintiff's discovery request *(In camera* Exhibit, Rec. #s 54,56), an exhibit largely overlooked or ignored by the trial court, and addressed by the Court

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1 *(Continued)*

In 29 U.S.C. Section 621, Congress noted that "older workers find themselves disadvantaged in their efforts to retain employment" and concluded that the purpose of the ADEA is:

> to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

The trial court, in a statement unsupported by evidence presented at trial or any legal precedent, arbitrarily asserted that older employees would likely experience difficulty merely because of their age, without any consideration of their experience or ability. This statement, if uttered by an employer, would be evidence of an ADEA violation.

Thus, the trial court's erroneous contention is not mere *dicta:* It indicates a fundamental misapprehension of the purpose and application of the ADEA, and shows an arbitrary discrimination toward older employees and to plaintiff in deciding to rely on defendant's evidence on its summary judgment motion.

of Appeals (Opp. Br. App. A, pp. 12a-14a) without the benefit of the rest of the evidence favorable to plaintiff.[2]

CONCLUSION

Petitioner requests that this Court reverse the decision below, and remand this action, in order to assure even-handed application of *Celotex*, and the fair application of the ADEA and related statutes and rights.

Respectfully submitted,

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[2] In a self-serving mischaracterization of "the crux" of this case (Pls. Br. Opp., p. 4) defendant represents that this case which was brought as a class action was an individual claim (Complaint, Rec. # 1). Plaintiff's motion for class certification was pending at the time of the trial court's ruling on the summary judgment.